United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

76-1201

To Be Argued By
THOMAS A. HOLMAN
MARK G. BARRETT

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FRANK GRADY and
JOHN JANKOWSKI,

Defendants-Appellants.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

(D.C. Crim. No. 76 Cr. 227)

JOINT REPLY BRIEF ON BEHALF OF APPELLANTS
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INTRODUCTION

This is an appeal from a conviction in a criminal case where the trial judge concluded from his assessment of two principal contentions by the defendants that (1) if *United States v. Moskowitz*, 356 F.Supp. 331 (E.D.N.Y. 1973) states the law correctly in respect to the right of superseding an indictment beyond the statute of limitations, then the defendants were correct in asserting that the

indictment upon which the government proceeded to trial was time barred, and (2) that in respect to the counts which charged conspiring to making false entries and to fail to make appropriate entries in records required to be maintained by a federally licensed firearms dealer it was only the *subsequent transfer* to fictitious or deceased persons that made out the violation of 18 U.S.C. §922(m) (Tr. 622-23, 730). Despite these clear indications that this was an extremely close case both on the law and on the facts in which there was good reason to question whether the superseding indictment was time barred and whether there was sufficient evidence to support the conviction of appellants of violating the false entry statute (18 U.S.C. §922(m)), the Government blithely asserts that appellants' contentions are "frivolous" or "utterly preposterous" (Gov. Br. pp. 21, 28).

In our original brief we have demonstrated that there is serious doubt that the Government proceeded in compliance with the applicable statute of limitations or its "savings" provision, and that the evidence was sufficient to support the conviction in respect to the "false entry" counts, and that further the jury would not have returned a verdict in respect to the "export" count were it not for the errors in the court's charge, the admission into evidence of the police reports of the Royal Ulster

Constabulary of Great Britain and the evidence of "subsequent similar acts" testimony. (See Grady and Jankowski Brief, pp. 17-48)

In respect to our reply to the Government's legal arguments, for the convenience of the Court we shall answer the Government's arguments under the same Point headings as appeared in our original joint brief.

POINT I

THE INDICTMENT UPON WHICH THE GOVERNMENT PROCEEDED TO TRIAL WAS TIME BARRED.

In an effort to minimize the significance of having proceeded to trial on a time-barred charging paper (the superseding indictment), the Government fails to adequately address the principal contentions of Grady and Jankowski that since the superseded or original indictment was never dismissed and there was never any finding by the trial judge of any defect in any count of the superseded indictment that the Government did not proceed in compliance with 18 U.S.C. §3288. Instead of addressing itself to the merits of these contentions, the Government attempts to give the faulty impression that the dispositive issue is one of form over substance while completely ignoring the proper function of the grand jury and the historic importance of the statute of limitations as a primary safeguard for the accused against stale criminal charges. The Government's contentions in their brief are principally three: (1) that the defendants were tried "in every important respect" on charges which were identical to those contained in the superseded indictment; (2) the filing of an indictment tolls the statute of limitations thus permitting a subsequent indictment at any time beyond the statute of limitations;

(3) The Government should be entitled under these facts to the benefit of 18 U.S.C. §3288.

The Governme t's first contention is that the similarity between the superseded indictment and the superseding indictment makes the issue a trivial matter of form and not substance. However, the Government ignores a rather substantial issue concerning the power of the grand jury to find an indictment even a single day beyond the expiration of the statute of limitations. A grand jury is without the power to find an indictment once the statue of limitations has expired. See *United States v. DiStefano*, 347 F. Supp. 442, 444-45 (S.D. N.Y. 1972).* The assertion of the Government that the indictments are similar "in every important respect" is certainly a matter of opinion not supported by a comparison between the conspiracy count in the superseding and the superseded indictment. The comparison reveals the Government's concern in March, 1976 that it did not have sufficient proof, perhaps, to establish that Grady and Jankowski conspired to make false entries in the log book *and* to export the carbines. So, the superseding indictment presents a new conspiracy charge which contains no reference

*Although *United States v. DiStefano, supra*, was cited in the original brief for this proposition, the Government does not discuss this case at all in its brief. (Grady and Jankowski Br., P. 20)

to export. The grand jury either agreed with the Government's concern or in performing its historical function decided that the conspiracy based upon the evidence presented to it in March 1976 did not warrant a charge of conspiracy to export the weapons.*

The cases cited by the Government for the proposition on page 22 of its brief that the trial court could have made these changes without resubmitting the matter to the grand jury begs a rather significant question. The Government in this case chose *not* to proceed on its original indictment and chose *not* to request that the trial judge amend the indictment. Furthermore, in *United States v. Cirami*, 510 F.2d 69 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975) there was a ruling made by the trial judge that certain language in the indictment was *surplusage* and was not submitted to the petit jury. All of these cases involve the *Ex Parte Bain*, 121 U.S. 1 (1887) question of the power of the trial court to amend on indictment.

It is absurd for the Government to speculate as to what the trial judge might have done had the Government

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* Clearly, the defendants are aggrieved by this change in the conspiracy count in spite of the Government's statement to the contrary (Gov. Br. p. 21). The grand jury's finding of an indictment of March 8, 1976 which eliminated any reference to a conspiracy to export was tantamount to a finding by that jury that the May 2, 1975 indictment of a conspiracy to export was not supported by the evidence.

moved to amend the superseded indictment. On this record it is a failure which may have been a most serious error. The Government concludes its first contention on page 22 of its brief with the nonsensical assertion that the "appellants accuse the Government of proceeding upon an incorrectly numbered accusatory instrument". The assertion is given inapposite support from *United States v. Strewl*, 99 F.2d 474 (2d Cir.) *cert. denied*, 306 U.S. (1939) which decided the question presented in this case that a finding by the trial judge of insufficiency is required to trigger the "saving" provision. (Grady and Jankowski Br., p. 25)

As to the Government's second principal contention, Grady and Jankowski anticipated that the Government would attempt to argue that an indictment seasonably found "tolls" the statute of limitations (See Grady and Jankowski's Brief, pp. 25-27). The Government's reliance on *United States v. Feinberg*, 383 F.2d 60 (2d Cir. 1967), *United States v. Powell*, 352 F.2d 705 (D.C. Cir. 1965), and *United States v. Wilsey*, 458 F.2d 11, (9th Cir. 1972) in support of their argument is misplaced as we have demnstrated in our original brief.

On page 24 of the Government's Brief, the Government asserts that it would be "free to try the appellants

(a second time) on the superseded indictment" or that it could "move to dismiss that (superseded) indictment and after the dismissal present the superseding indictment. The Court need not reach these issues which are spuriously raised by the Government. We do not choose to contravert these assertions in this Court nor do we believe that it would be proper to do so.*

Moreover, the Government strains credulity in asserting in its Brief on page 24 that "[a]s has been recognized by this Court and the other circuits which have considered the question, the statute of limitations afford no protection to a defendant after an indictment has been filed". This statement, finds limited support in the group of cases cited by the Government which are concerned with the issue of post-arrest delay and hold that it is the indictment which must be found before the expiration of the statutory period, and an arrest does not toll the statute of limitations. *United States v. Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967) *cert. denied*, 389 U.S. 1044 (1968).

While this Court has not had occassion to rule that the Ninth Circuit interpretation of *Feinberg, supra,*

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* However, it is ignored by the Government that the trial judge found the *superseded* indictment sufficient in all respects in ruling on Grady motion to dismiss Counts 2-18 for failure to state an offense. (SR.2, Tr.21)

is incorrect, it is noteworthy that in a recent decision concerning 18 U.S.C. §3288 that this Court did not suggest that the finding of an indictment tolls the statute of limitations. In *United States v. Macklin*, 2d Cir., Doc. No. 75-1419, decided May 3, 1976, slip opinion, p. 3525, this Court seemed to suggest that 18 U.S.C. §3288 only will save an untimely brought indictment when this Court stated at P. 3527:

> "If the indictment is not saved by the provisions of 18 U.S.C. §3288, the statute has concededly, run."

Finally, the Government contends that the six month saving provision of 18 U.S.C. §3288 should be applied in this case. This argument is not supported by an examination of §3288 and its legislative history which appellants have done at length in their joint brief. (Br., PP. 18-25).

The Government asserts in its brief at page 26 that no "actual dismissal" order is necessary to trigger the grace period of §3288, but that an "actual dismissal" in this case would be a "needless formality" as required by the *Moskowitz, supra*, decision. However, the Government apparently has overlooked the cases cited by appellants in their brief which also construe §3288 to require a dismissal or finding by the trial court that the indictment is otherwise insufficient. See *United States v. Strewl*, 99 F.2d

474 (2d Cir. 1938), cert. denied 306 U.S. 638 (1939). *United States v. DiStefano*, 347 F. Supp. 442 (S.D. N.Y. 1972); *United States v. Moriarity*, 327 F. Supp. 1045 (E. D. Wisc. 1971).

The Government strains credulity in suggesting that the superseding indictment was "in response to technical objections raised by the defense," and that it is therefore an insignificant question whether the "requested changes" were voluntarily accomplished by a superseding indictment or by compulsion as would be the result if by court order. A brief examination of the "technical objections" raised by the defense will demonstrate the utter folly of this position. Further, and more significantly §3288 cannot be construed to embrace the Government's position that the Government may at its own descretion supersede an indictment after the statute of limitations has expired.

Limiting discussion to the three "technical objections" raised by the Government, none of these issues raised by pre-trial motion could be sufficient reason to justify a superseding indictment under these circumstances; or for that matter, would they justify superseding an indictment under any plausible set of facts.

A pre-trial motion to dismiss the "false entry" counts as multiplitious was brought in June, 1975, and this

motion was denied by the trial judge on September 22, 1975.* A pre-trial motion to strike the words "implements of war" from the conspiracy count was brought in June, 1975, and the trial judge denied this motion on June 30, 1975.** A pre-trial motion to dismiss the false entry counts (2-18) of the superseded indictment was brought in February, 1976 on the ground that these counts failed to state an offense. Judge Brieant denied this motion on March 4, 1976 ruling that "it is quite clear on its face (that) the indictment is sufficient and the proper time to make a motion based on the fact that the government has *insufficient proof* is when the government rests." (SR. 2, Tr. 21).

The "technical objections" which the Government would have this Court believe were the compelling factors causing it to supersede its original indictment had been "overruled" emphatically by the trial Judge. The incredulous *noblesse oblige* of the Government's position cannot obscure

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*The trial judge ruled that"an indictment alleging that 17 weapons were transferred and 17 false entries were made may charge 17 separate counts of falsifiying firearms purchase records without being multiplicitious".

**Judge Brieant ruled that "(t)he indictment tracks the statute, 22 U.S.C. §1934(b), in its use of the term "Implements of War". The words are not surplussage; nor are they, in the context of this case, unduly prejudicial."

that §3288 does not apply unless there has been a finding by the trial court of insufficiency of the indictment which plainly enough was not found in this case.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT FALSE ENTRIES WERE MADE IN A FEDERAL FIREARMS RECORD.

The Government asserts in its brief that the violation of 18 U.S.C. §922(m) and 923(g) occurred because the men who so willingly agreed and did sign their true names, addresses, social security numbers and other appropriate identifying facts in Jankowski's federal firearms record (logbook) were not the actual transferees. (Gov. Br. 28) The assertion that the actual transferees included Grady, Lyons and the Irish Republican Army is a distortion of the record that twists the facts to suit an expedient construction of the statute involved. (Gov. Br. p. 30) Grady signed the logbook with his true name, address and social security number for two carbines, and the Government concedes that he did not violate §922(m), although the evidence supports the view that Grady did nothing more or less than O'Brien, Casey, Dennehy, McMorris, and the others who signed the logbook. It must follow that if Grady was a transferee then these other signatories are transferees in the sense contemplated by the statute. Introducing the inflammatory and highly tenuous connection of these men to the Irish Republican Army as the Government does in its brief does

not make the Government's position any stronger. All of these men came to Jankowski's store to accomplish the very same purpose. These men all wanted to secure firearms from Jankowski and the purpose, while inflammatory, is irrelevant to establishing a violation of *this* law. Either Grady *and* his associates were transferees or *all* of them were not. The Government failed at trial to establish any meaningful difference in respect to the acts of these men including Grady and Jankowski who all signed the logbook.

The assertion by the Government that the subsequent transfer to deceased or ficticious transferees is itself the violation of §922(m) and the regulations thereunder is clearly erroneous. 18 U.S.C. §922(m) and §923(g) place responsibility for record keeping on the dealer. Transfers of firearms, as in this case, which do not take place on the licensee's premises and are not known to the licensee are simply not a violation of the Act. In this case it is asserted that since the transfer scheme was deceptive, that *ipso facto* a violation of the statute has occurred. This assertion is utterly preposterous and is unfounded in a fair reading of criminal statutes.

Further, the Government fails to adequately respond to Jankowski's assertion that he had no knowledge of the subsequent transfer. (Gov. Br. p. 32) The Government

in its brief at page 30 concedes that the "evidence was highly inculpatory, particularly of Grady" i.e. that there is no evidence inculpatory of Jankowski's role in connection with the preparation or distribution of any of the documents indicating a transfer to a fictitious or deceased person. Assuming *arguendo* that the subsequent transfer is relevant to the statute, knowledge of the deception or falsity by the licensed gun dealer is the *sine qua non* of 18 U.S.C. §922(m) and this principle is reflected in Judge Brieant's charge. (Tr. 916) *Rich v. United States*, 383 F.Supp. 797, 799 (S.D. Ohio, 1974).

The Government has outlined in its brief that Jankowski had some knowledge that these men were going to export the weapons to Northern Ireland. (Gov. Br. pp. 31-32) Knowledge of this plan to export does not bear upon Jankowski's obligation to record the true identities of the men he had every reason to regard as the true purchasers. The weight of the evidence, on the contrary, indicates that Jankowski treated each signing as a separate transfer in the sense that each signatory would have responsibility for his weapon or weapons. First, when O'Brien first introduced Lyons to Jankowski, Jankowski insisted, at the outset that he wanted a "signature for everybody" and "that everything had to be legal". (Tr. 76, 77, 115) Furthermore,

Jankowski, regarded those who signed the book as being the people responsible for the guns. (Tr. 668, 669)

Third, even the men who signed the book regarded themselves or the owners of the weapons with legal responsibility for them. (Tr. 189, 210, 211)

The cases cited by the Government in support of its theory of the case are clearly distinguishable from the case at bar. In *United States v. Resnick*, 488 F.2d 1165 (5th Cir. 1974), the arms dealer not only, as the Government contends (Gov. Br. p. 29), permitted his employee to sign the record instead of the actual out-of-state purchasers but actually requested her to do so. Unlike Jankowski, *Resnick* was the originator and director of the scheme, leaving no questions concerning his knowledge and intent.

In *United States v Haimovitz*, 404 F.2d 38 (2nd Cir. 1968) and *United States v. Honer*, 253 F.Supp. 400 (S.D.N.Y. 1966), the defendants were charged with paying others to collect their winnings at Yonkers Raceway to avoid reporting to track authorities and the Internal Revenue Service their own identities. The scheme was a violation of the 26 U.S.C. §7206 which forbids willfully procuring preparation of a document which is fraudulent or is false to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the

person authorized or required to present such document. There, the defendants were charged with defrauding the unwitting track authorities into filing false records with the I.R.S., an offense not requiring knowledge or intent on the part of the custodian of the records and is analagous to a violation of 18 U.S.C. §922(a)(6) which forbids making false statements intended to deceive a gun dealer in connection with the acquisition of firearms. Here, the defendants, a customer and the custodian of the records, were charged with, acting in concert, knowingly making and causing to be made false entries in the records. 18 U.S.C. §922(m). Since there the defendants in this case have not been charged with making false statements with intent to deceive a licensed firearms dealer under 18 U.S.C. §922(a)(6), the cases interpreting the similar provision of the I.R.S. code (26 U.S.C. §7206), are not in the point.

Finally, in regard to the contention (Br. at 31) that defendants took no objection to the portion of the Judge's charge interpreting 18 U.S.C. §922(m), the defendants formally excepted to the interpretation at least three times in the pre-charge conference (Tr. 734, 738, 742), and vigorously argued their grounds. (Tr. 726-749) Defendant Grady reiterated his exception after the instructions to the jury (Tr. 940); defendant Jankowski joined in it (Tr. 941-942); and it was duly noted by the Court (Tr. 942).

POINT III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE POLICE REPORTS OF THE ROYAL ULSTER CONSTABULARY OF GREAT BRITAIN.

The Government attempts to sustain the admissibility of police reports which violated Rule 803(8)(B) of the Federal Rules of Evidence. Principally the Government argues that the reports are not police or law enforcement reports and further that if inadmissible under Rule 803(8)(B) that these reports are admissible as either business records or under Rule 803(24) and 804(B)(5).

The assertion by the Government that these reports are not from a law enforcement agency but from "a laboratory of forensic sciences" is utterly absurd. (Gov. Br. p. 34).

The information contained in these reports were in all instances provided by officers of the Royal Ulster Constabulary, and that these forms were *submitted* for examination to the Department of Industrial and Forensic Science, Ministry of Commerce is completely irrelevant. Clearly, in these forms prepared by officers of the Royal Ulster Constabulary is information observed by police officers and specifically *excluded* by Rule 803(8)(B) of the Federal Rules of Evidence. (Grady and Jankowski Br., pp. 34-43)

When the Government attempts to characterize these reports as merely the product of the most "routine" observation of "recording certain serial numbers and receipt of certain weapons", the Government misses completely the concerns expressed by Congressman Dennis which are set forth in the Government's brief on page 35. The seizure of the firearms in Northern Ireland constitutes the evidence essential to support the charge of exporting weapons outside of the United States, which is neither disputed by the Government or by appellants.

The Government does not argue convincingly that these records are business records admissible under Rule 803(6). All the cases cited by the Government pre-date the enactment of Rule 803(8)(B) and are otherwise distinguishable by their facts.

In *United States v. Fricks*, 409 F.2d 19 (5th Cir. 1969) three documents were involved. The only police record was "inventory records" of a rifle shipment which was not essential to prove an interstate shipment of stolen rifles since the *non police* record inventory sheets of the proposed shipper and the dealer were also offered by the Government and were otherwise admissible. Clearly, a date in a police blotter reporting a vehicle stolen in *United States v. Wolosyn*, 411 F.2d 550 (9th Cir. 1969) would

qualify as a business record, but this ministerial police report is completely dissimilar from the foreign police reports of this case.

The Government concedes on page 37 of its brief that the officer from the Royal Ulster Constabulary who was the only foreign police officer to testify was not the custodian of Government Exhibits 7 and 8. A written statement from the custodian that these records (GX7 and 8) were made "as required by the nature of this office" is understood by the Government to be adequate as an attestation by a custodian "over whom the Government lacks compulsory process". A more revealing statement by the Government would be words to the effect that a request was made and refused by the custodian to appear in the District Court. However, this request was evidently not even attempted by the Government. (Gov. Br. pp. 37-38)

The Government's final contention is that the reports are admissible under Rules 803(24) and 804(B)(5). This contention is without merit.

The requirement of Rule 803(24) that it will apply only to "statements not specifically covered by the foregoing exceptions" is apparently ignored by the Government. See Rule 803(8)(B). 803(24) further states that the "statement (be) more probative on the point for which

it is offered than any other evidence which the proponent can procure *through reasonable efforts*." The Government concedes that the evidence of when and where the weapons were found would be the testimony of numerous officers of the Royal Ulster Constabulary whose presence at trial "the Government was unable to compel". (Gov. Br. p. 41) This statement is nowhere found in the record, and is at the very least a misleading statement. The "reasonable efforts" requirement of 803(24) would be satisfied, perhaps, by requests for these witnesses to the appropriate authorities of Great Britain. Evidently no efforts at all were made by the Government to secure the attendance of these witnesses at trial.

For the Government to say, as it has on page 41 of its brief, that its witnesses are a long distance away is not equivalent to demonstrating that they are unavailable for trial. The Government has failed to meet the requirements for satisfying either 803(24) or 804(B)(5).

The police reports provided the material element of the charge of export. Without these reports the very four weapons carried into court by the officer of the Royal Ulster Constabulary could not be said to have been found in Northern Ireland. Without these reports the jury would not have had sufficient evidence to find that these weapons

had been exported to Ireland, and so it cannot be said that the introduction into evidence of this evidence was harmless error.

POINT IV

THE TRIAL COURT ERRONEOUSLY PERMITTED "SUBSEQUENT SIMILAR ACTS" TESTIMONY.

It is the well settled rule in this Circuit that it is an abuse of discretion for a trial judge to allow into evidence similar acts of a defendant "where the prejudice is substantial and probative value through the nature of the evidence or *lack of any real necessity for it*, is slight ..." (Emphasis added). *United States v. Byrd*, 352 F.2d 570, 575 (2nd Cir. 1965).

In the trial of this case, Judge Brieant allowed into evidence the testimony of a former associate of Grady, John Casey, that on several occasions in 1971 he observed defendant Grady assisting others with crating firearms or carrying trunks of firearms. (Tr. 254-263) Judge Brieant ruled that the testimony was probative of Grady's intent and motive and Carey's credibility. (Tr. 762)

The prejudicial effect of this testimony is substantial and obvious. The testimony cast defendant Grady as being connected with a large gun-running operation which was linked through this testimony to a continuing guerrilla war in Northern Ireland, a conflict whose horrors are

reported daily in the news media. Such evidence had the possibility, and probably the effect, of inflaming the jury. In a trial like this one, the over-riding consideration for the trial judge should be to maximize the likelihood that the jury will decide the issues before it in a dispassionate manner.

More importantly, the Government was faced with no real necessity to offer this testimony. Defendant Grady, against whom alone Judge Brieant permitted this evidence, had not sharpened the issue of intent by asserting that the acts charged were done innocently or by accident or mistake. The Government did not require any further evidence on the undisputed question of intent. The meetings of early 1970, prior to the transactions at Jankowski's store, related by O'Brien, Dennehy and Casey, were sufficient evidence of intent on those counts. In this light, the "subsequent similar acts" must be seen, in the least, as cumulative evidence of motive, totally unnecessary and it was improper to have submitted this evidence. *United States v. Adams*, 385 F.2d 548, 551 (2d Cir. 1967), *United States v. Gaus*, 471 F.2d 495, 499 (7th Cir. 1973).

POINT V

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONVICT GRADY OF EXPORTING WITHOUT A LICENSE BY FAILING TO INSTRUCT THAT GRADY HIMSELF DID NOT REQUIRE A LICENSE AS AN AIDER AND ABETTOR.

Judge Brieant, in his charge to the jury, erred when he charged that the jury could find Grady, who did not have a license to export, guilty of exporting without a license if they thought the actual exporting was done by Martin Lyons without also making clear that they must also find that Lyons did not have a license as well. (Tr. 930, 931) Also, in outlining the elements of the offense, Judge Brieant focused solely and repeatedly on Grady's failure to have a license. (Tr. 928, 929)

There is not a scintilla of evidence that Grady himself did the exporting. Nor is a conspiracy charged on the question of export which can allow the Government to use circumstantial evidence as a dragnet. See *United States v. Stone*, 452 F.2d 42, 46 (8th Cir. 1971). What is charged is one substantial count of illegal export in violation of 22 U.S.C. §1934 and the elements of the charge must be clearly and accurately explained to the jury.

Finally, in regard to the Government's contention

that no objection was taken to the Court's charge on this point, a formal exception was duly made by counsel for Grady after the instructions to the jury were completed and the exception was duly noted by Judge Brieant. (Tr. 938)

CONCLUSION

FOR THE REASONS STATED ABOVE AND FOR THE REASONS STATED IN OUR ORIGINAL BRIEF, WE RESPECTFULLY SUBMIT THAT THE CONVICTION OF DEFENDANTS FRANK GRADY AND JOHN JANKOWSKI SHOULD BE REVERSED.

Dated: New York, New York
August 9, 1976

Respectfully Submitted,

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Reply Brief

IS HEREBY ADMITTED.

DATED: 8/13/76

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